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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 128

MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,  
*Appellants,*

*vs.*

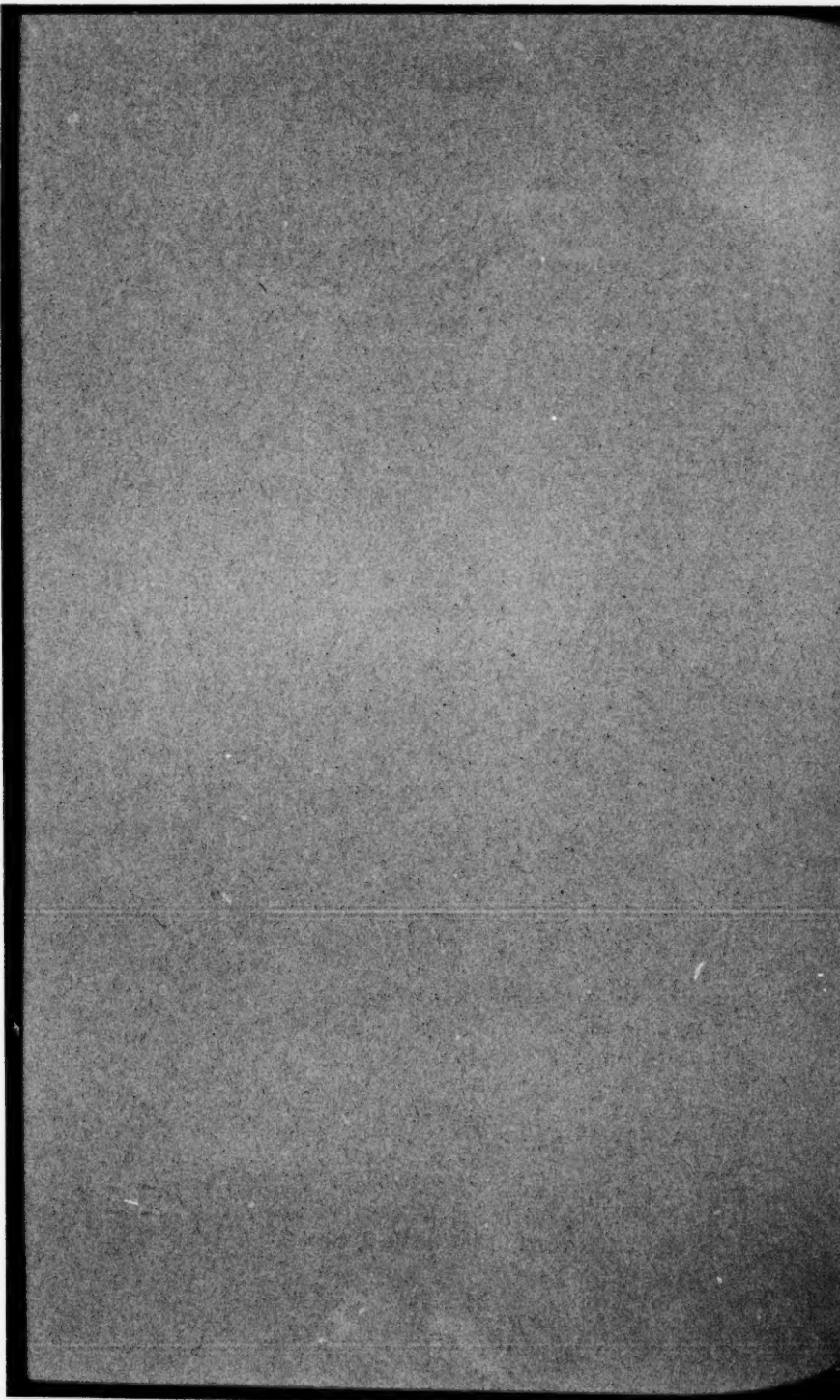
J. B. FERGUSON, H. L. CONLEY, GEORGE BRADLEY,  
*Etc., Et Al.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

STATEMENT AS TO JURISDICTION

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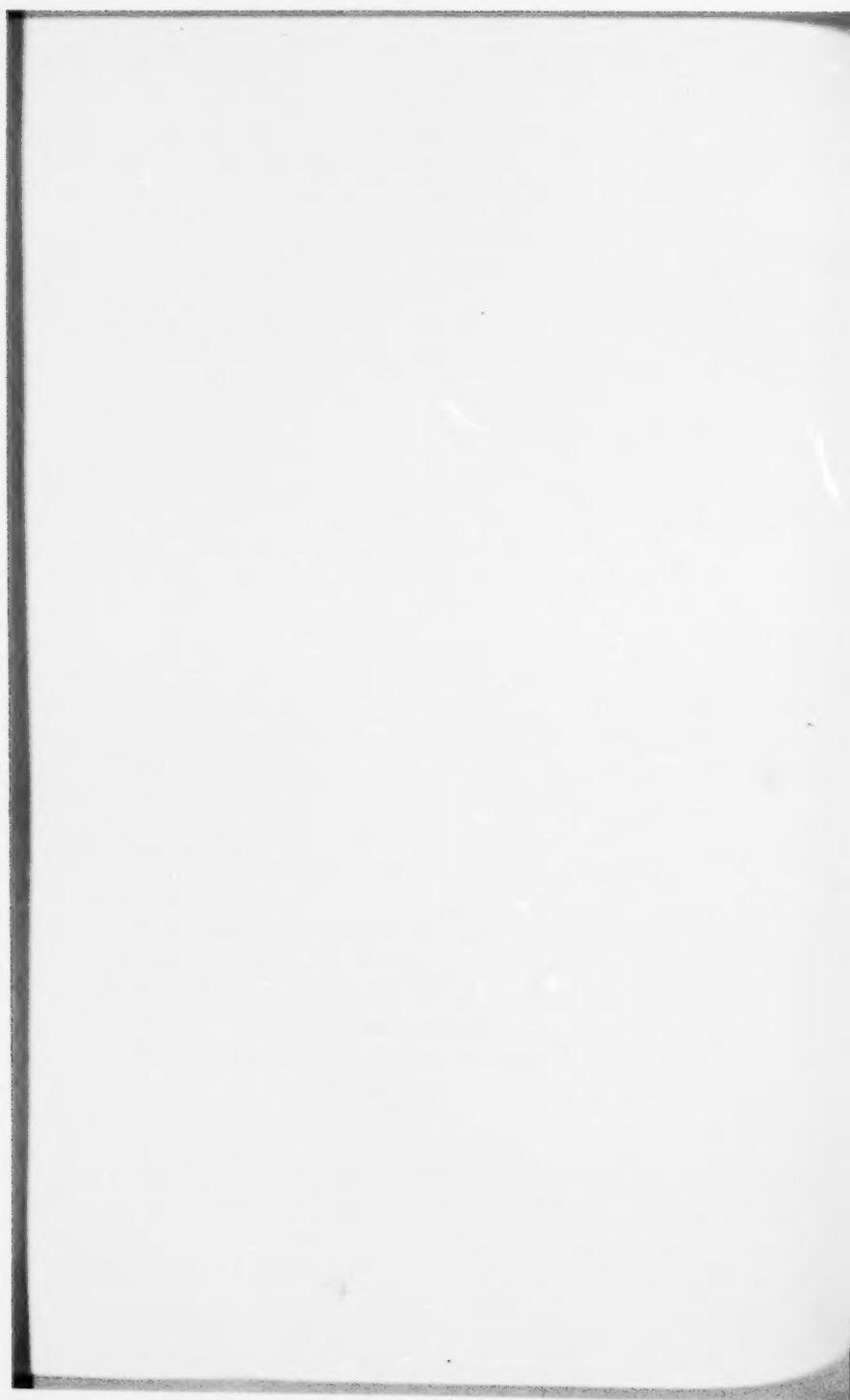
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IN THE SUPREME COURT OF THE STATE OF  
OKLAHOMA

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**No. 29754**

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MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,  
*vs. Plaintiffs in Error,*

J. R. FERGUSON, H. L. CONLEY AND GEORGE BRAD-  
LEY, DIRECTORS OF INDEPENDENT CONSOLIDATED SCHOOL  
DISTRICT No. 7, OF HARRAH, OKLAHOMA COUNTY, STATE  
OF OKLAHOMA, A BODY POLITIC; PEARL CARPENTER,  
CLAUDE MARTIN, FRED MITCHELL, JOHN SEN-  
KOWSKI AND N. H. KOOCE,  
*Defendants in Error.*

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**STATEMENT OF APPELLANTS (PLAINTIFFS IN  
ERROR) TO BE FILED, ALONG WITH ACCOMPANY-  
ING RECORD, IN THE SUPREME COURT OF THE  
UNITED STATES, ACCOMPANYING WRIT OF AP-  
PEAL HERETOFORE AND ON THE 14TH DAY OF  
MAY, 1942, GRANTED BY THE SUPREME COURT  
OF THE STATE OF OKLAHOMA, TO THE SAID  
SUPREME COURT OF THE UNITED STATES, DIS-  
CLOSING BASIS UPON WHICH IT IS CONTENDED  
THAT THE HONORABLE SUPREME COURT OF  
THE UNITED STATES HAS JURISDICTION, UPON  
AN APPEAL TO THAT COURT, TO REVIEW THE  
JUDGMENT OR DECREE IN QUESTION.**

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The above named appellants (Plaintiffs in Error below)  
ask this Honorable Court to take jurisdiction of this pro-

ceeding under various constitutional provisions, Judicial Code No. 266, and to enforce the terms of the treaty between the Republic of France and the Republic of the United States commonly known as the Louisiana Treaty of the year 1803, and particularly Article 111 thereof. (U. S. statutes at Large, Volume 8, page 220.)

### **Statement of the Case.**

Section 1, Session Laws of Oklahoma, 1939, page 183, is as follows:

“That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this state shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board.”

being now known as Title 70, Section 1196. Oklahoma Statute 1941.

On the opening day of the schools—public, private and parochial—for the scholastic year 1939 and 1940, the appellants were residents, citizens and taxpayers of Independent Consolidated School District No. 7 of Harrah, Oklahoma County, State of Oklahoma, which, under the school laws of Oklahoma, is constituted a body corporate, Title 70, paragraph 183, Oklahoma Statutes, 1941, providing, among other things, the following:

“Independent District a Body Corporate—Powers—Actions. • • •”

The above named school district, together with its trustees in charge of its corporate affairs, and the five drivers of

school bus routes within the territorial confines of said district are, respectively, the respondents herein.

On the morning of the opening of school ten children of these three appellants, taxpayers of said district, of compulsory school age, were tendered at convenient points along the highway some two to four or probably five miles from the location of the consolidated school within the town of Harrah which was being operated as a public school, and for the purpose of being transported to the site of the public or common school within the town of Harrah, intending to walk from there, in compliance with said Act, to the parochial school known as St. Teresa, which is a Roman Catholic parochial school, taught by Roman Catholic Sisters of the Carmelite Order within the said town of Harrah. The children so tendered were refused transportation notwithstanding the 1939 Act of the Legislature of Oklahoma, aforesaid. Thereupon the three appellants instituted an action in Mandamus, setting out in detail, in three separate counts each for the three families (R. 26 to 38), said actions being instituted in the District Court of Oklahoma County, of which all the respondents herein were residents to enforce the legislative enactment aforesaid.

An alternative writ of mandamus was issued, directing the respondents to show cause why the writ of mandamus should not be issued requiring them to comply with the aforesaid transportation act as to school buses of said School District (R. 43 to 50).

Each set of defendants appeared and contested the legality of this act, by demurrer. The respondents, School District and Trustees' demurrer appearing at pages 51 to 52 of record, and the bus drivers' separate demurrer appearing at pages 53 to 54 of record.

Thereupon, leave was granted the appellants, plaintiffs below, to file an amendment to their petition, pending determination of the demurrers filed by the respondents (R. 55

to 58). The essential allegations of this amendment to the appellants' original petition were that both St. Teresa Church and St. Teresa parochial school were established by and under the authority of the Roman Catholic Bishop of the State of Oklahoma; that said school is supported by private contributions, subscriptions and tuition, and is a private school; that it is open for instruction of pupils, whether of the Roman Catholic faith or not, and that pupils of the protestant faith, or those of no confessed religion at all, are freely admitted as pupils in said school, but that the children of Catholic parentage receive religious instructions in addition to the ordinary instructions given in said school district in the public or common schools; that children of non-Catholic faith may, at their option, or the option of their parents, take such religious instructions; that the same text books, being the free text books furnished to all children of compulsory school age of the State of Oklahoma, are in use in said St. Teresa Parochial school; that the teachers in said St. Teresa parochial school are qualified under the law of the State of Oklahoma as are teachers in public schools; that within the territorial confines of said respondent school district the census for the current school year of 1939-1940 shows 289 boys and 279 girls, or a total of 568 pupils, residents of said territorial school district falling within the compulsory school age under the laws of the State of Oklahoma; that said census includes all children attending St. Teresa parochial school, and that there is enrolled in St. Teresa parochial school a total of 41 children within said school age and residing within the territorial limits of said school district; that the said school board include in its budget to be collected by taxation on all property within said school district for the current year 1939-1940 a total of \$8450.00, to meet rental and hiring of vehicles for the transportation of all children attending school within said school district, which included



the children attending St. Teresa parochial school, and the taxpayers within said territorial limits of said school district have had levies made upon their property for the purpose of taxation, and for the specific purpose of furnishing \$8450.00 for the transportation of pupils, and that said tax has been assessed against all the property within said school district subject to taxation for said applicable fiscal year. That pupils attending said St. Teresa parochial school could conveniently be picked up by the five separate bus routes now serving said common or public schools at convenient places where other children attending public or common schools along said routes are located, and transported to said public or common school, and from there could conveniently walk to said St. Teresa parochial school, and that at the close of the school day in the afternoon said St. Teresa parochial school children could conveniently assemble at said public school building in the Town of Harrah, and be transported along the regular bus routes without any other expense whatsoever than had already been contracted by said school district board.

After the filing of this amendment to the petition, the respondents filed their separate demurrers, the school district and trustees' appearing at pages 79 to 81 of record, and the bus drivers' at pages 81 and 84 of record.

Upon consideration by the trial court, these demurrers were sustained on two grounds and overruled as to one ground. Said act, Section 1196, Title 70, Oklahoma Statutes 1941, being held unconstitutional on the second and third grounds set out in said demurrers. (Journal Entry of said judgment (R. 86 to 91).)

The appellants here elected to stand on their said petition and amendment to petition and refused to further plead, and said cause was dismissed, from which an appeal was duly perfected to the Supreme Court of Oklahoma, and there, in an opinion concurred in by eight of the Jus-

tices and dissented to by one of the Justices of said court, the trial court judgment was affirmed and petition for rehearing was duly presented (R. 108 to 114). This petition for rehearing, upon due consideration, was overruled on March 10, 1942, and thereupon this appeal has been brought to this Court by writ allowing the same by the Vice Chief Justice of the Supreme Court of Oklahoma (R. 13). Opinion of the Supreme Court of Oklahoma affirming the lower court's judgment denying the plaintiff the writ of mandamus applied for (R. 100 to 107).

The provisions of the opinion and the trial court's judgment are, first, a denial of the fact that House Bill No. 623 of the Legislature of Oklahoma, approved April 28, 1939, now Section 1196, Title 70, Oklahoma Statutes 1941, in any manner offended Section 57, Article 5, of the Constitution of the State of Oklahoma providing for the form of the title of a legislative act; second, that the said act and section aforesaid is in violation of Section 5 of Article 2 of the Constitution of the State of Oklahoma, in that the effect thereof is to appropriate public money or property, directly or indirectly, for the use, benefit, or support of any sect, church, denomination or system of religion, or for the use, benefit, or support of any sectarian institution as such, and is, therefore, void, and the demurrer of the defendants respondents herein should be and the same is hereby sustained; third, that the aforesaid act is in violation of Section 3, of Article 11, of the Constitution of the State of Oklahoma, in that it has the result of providing for the use of the permanent school fund for purposes other than the benefit of the common schools of the State, and said Act is, therefore, on said ground and for said reason void, and the demurrer of the defendants (respondents herein) thereto is hereby sustained.

The provisions of the Constitution, section 5, of the Article 2, are as follows :

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”

The above section is found in Oklahoma Statutes Annotated, Constitution of Oklahoma. The other section, to-wit: Section 3, of Article 11, Oklahoma Statutes Annotated, Constitution of Oklahoma, Page 1056, is as follows :

“The interest and income of the permanent school fund, the net income from the leasing of public lands which have been or may be granted by the United States to the State for the use and benefit of the common schools, together with any revenues derived from taxes authorized to be levied for such purposes, and any other sums which may be added thereto by law, shall be used and applied each year for the benefit of the common schools of the State, and shall be, for this purpose, apportioned among and between all the several common school districts of the State in proportion to the school population of the several districts, and no part of the fund shall ever be diverted from this purpose, or used for any other purpose than the support and maintenance of common schools for the equal benefit of all the people of the State.”

Were we to take the decision of this Honorable Court, speaking through Mr. Chief Justice Hughes, in the case of *Cochran v. Louisiana State Board of Education*, 281 U. S. 370, and superimpose upon said decision the words, “school buses” to be furnished children attending the parochial school in question, instead of “text books” furnished to the children of Louisiana attending such charac-

ter of schools, the court would have in this appeal a complete authority for granting of the right to appeal with the right on the part of the appellants to properly present the matter to this Honorable Court. In this connection, will say that the appellants attach hereto as a part of this, their showing, wherein they seek the jurisdiction of this Court to right this wrong, an opinion of the Attorney General of the State of Oklahoma after the U. S. Supreme Court's decision in the *Cochran* case, *supra*.

The fifth numerical section of the appellants' assignments of error (R. 3 to 11). The essential allegations therein are based upon Mr. Justice Hughes' decision affirming the text book case on appeal from the Supreme Court of Louisiana, *supra*. They are, in substance, to the effect that funds furnished students of private and parochial schools as provided by the 1939 Act and raised by general taxation as and when children attending such schools were transported therein, was in no manner in aid of religion prohibited by the provisions of the Constitution of the State of Oklahoma as decided by our Supreme Court, since the funds were raised by general taxation on all taxable property within said school district and in no manner dependent upon the public funds owned and held in the State of Oklahoma referred to in the constitutional provisions given by the trial court and the Supreme Court of Oklahoma as the reason for sustaining the demurrers to the appellants' petition and amendment to the petition, but were a benefit to the child and the public, they being school children of the State of Oklahoma along with all other children of compulsory school age in the State of Oklahoma attending public or common schools.

What is the use of a parent who desires to send his children to a parochial, religious or private school having the liberty so to do if he is denied free school bus transportation, when his children attending such schools are used

in the census of pupils of compulsory school age and public funds gathered by taxation levies against his property subject to taxation are the source of revenue by the expenditure of which said bus accommodations are given? The effect of the decision of the Supreme Court of Oklahoma denying this right deprives the parent of a valuable property right, results in taxation without any corresponding right to be enjoyed by him and his children, and is in violation of the fundamental rights of citizenship in this nation.

The State of Nebraska, by enforcement of a decision of the Supreme Court of that state, in *Meyer v. State of Nebraska*, 262 U. S. 390, in an opinion by former Justice McReynolds of this Honorable Court, reversed the Nebraska Supreme Court in its holding that instructions in any language in the schools other than the English language was illegal and unlawful under the laws of the State of Nebraska.

The State of Oregon in what is commonly known as the Oregon School Law, in the case of *Pierce v. Society of Sisters of Holy Name*, 268 U. S. 1079, had before it for construction the Oregon School Law compelling all persons of compulsory school age within said state to attend public schools. Mr. Justice McReynolds likewise delivered the opinion of this Honorable Court in said case, holding said law was unconstitutional and that the parent had the right to select the schools where he would send his children for their education. This decision is more or less on valuable property rights owned by the private or parochial schools which would have been completely destroyed had the Oregon school law been enforced, and also gives due consideration to the rights of a parent to exercise the power of selection as to what schools he will send his children. The Oklahoma decision is but another impediment thrown in the path and free passage of the parent in his election to send his children to a parochial or private school.

There is no reason appearing both in the trial court's decision and in the decision of the Supreme Court of Oklahoma for striking down the particular section of this 1939 Act as unconstitutional, any more than there would be in the refusing to allow free text books. The text books are furnished at public expense, and the buses for school transportation are furnished, as shown in the record in this case, by taxation against all property, based on all children of school age, parochial, private and public school children, and raised by assessment on common property subject to taxation within such district.

We now call this Honorable Court's attention to certain provisions of the school laws of Oklahoma. The taking of a school census within a school district such as the respondent is authorized by Section 301, Title 70, Oklahoma Statutes 1941. School children are declared to come within the compulsory school law, with certain exceptions, by the Constitution of Oklahoma, Section 4, of Article 13, O. S. A., Constitution. The Legislature of Oklahoma, by the provisions of Section 401, Title 70, Oklahoma Statutes 1941, fixes the compulsory school age of children at from 6 to 17 years of age. By the provisions of Section 403 of Title 70, Oklahoma Statutes 1941, free text books are furnished independent of what school a child of compulsory school age attends. Even our legislature has gone to the extent, by virtue of Section 460, Title 70, Oklahoma Statutes 1941, of providing for free bus transportation to all colored children, and in the event there are not as many as ten colored children attending a separate colored school, as required by Oklahoma law, then the school authorities having jurisdiction over such territory are authorized to transfer these pupils to other school districts, and such colored children of school age have the benefit of free bus transportation to the place where their schools are operated.

Article 111 of the Louisiana Treaty, which is binding on the residents within the territory so ceded by the Republic of France to the United States, book and page heretofore set out, is as follows:

“The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the provisions of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.”

It is fundamental that courts take judicial notice of geographical locations. It is, therefore, fundamental and needs no citation of authority, that the court will understand that Oklahoma, the entire state, is within the province ceded by the Republic of France to the United States under the treaty aforesaid.

Article IV of the Constitution of the United States reads as follows:

“The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

United States Constitution, Article VI, reads:

“All debts contracted and engagements entered into, before the adoption of this Constitution shall be valid against the United States under this Constitution as under the Confederation.

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be

bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

Article 1 of the Constitution of the United States reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitutional Amendment V provides that no person shall be:

"deprived of life, liberty or property without due process of law."

The amendment reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."



United States Constitutional Amendment XIV, Section 1, reads as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

United States Code Annotated, Title 8, Section 43, reads as follows:

“Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.”

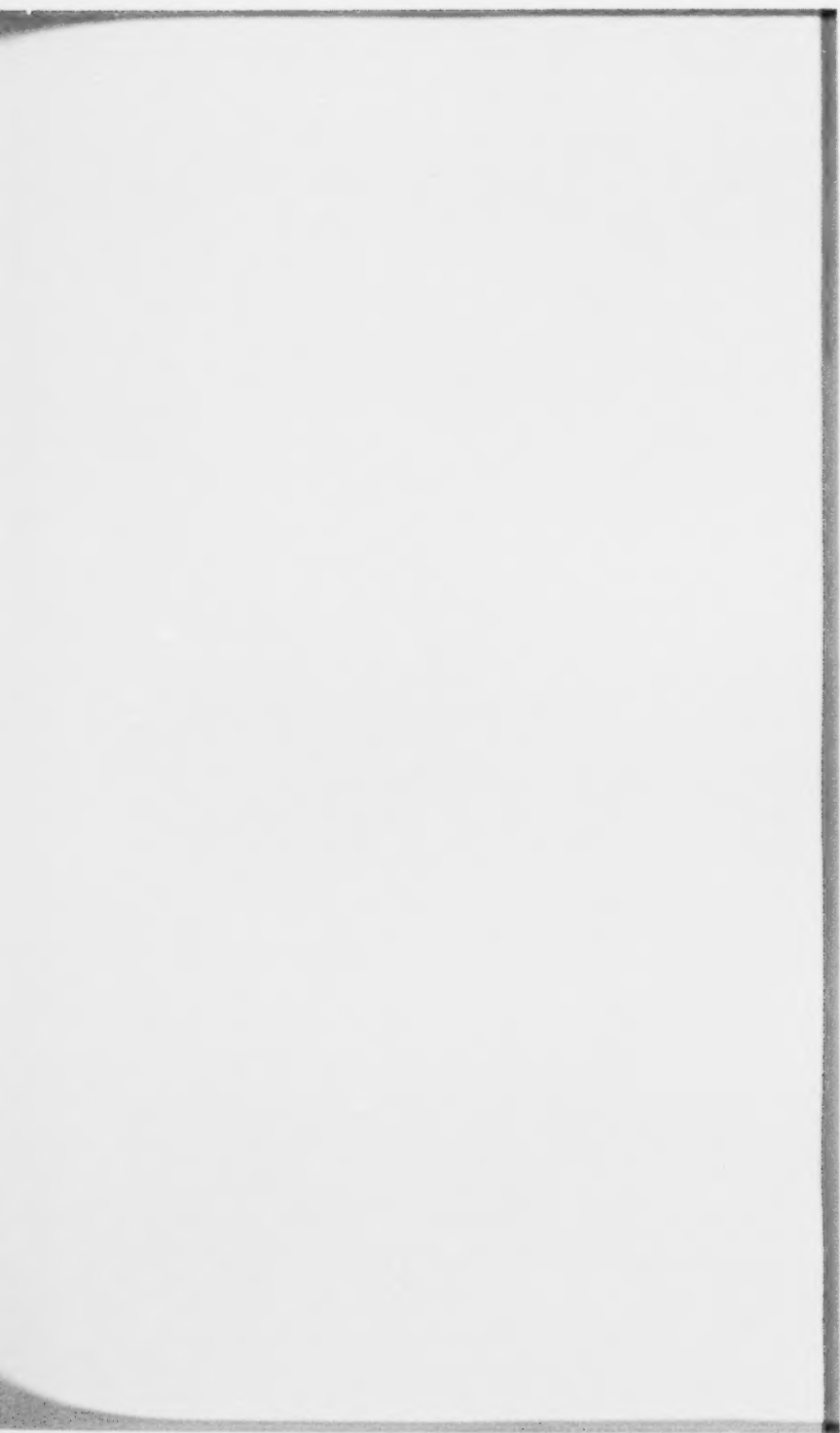
We present that under the provisions of the Louisiana Treaty, the aforesaid sections of the original Constitution and Amendments V and XIV thereof, the Constitutional questions therein are supreme and paramount authority for the proper construction of the case we are now presenting to this Honorable Court for the purpose of having the same reversed on appeal, especially in the light of the fact that the funds used and expended in bus transportation for school children are furnished by taxpayers submitting to a levy of taxes for said purpose within the territorial limits of the school district respondent herein, and, therefore, now

respectfully submit this cause for the consideration of the Honorable Supreme Court of the United States, and request that that high Court take jurisdiction to resolve the apparent dispute shown by the foregoing and preceding statement to be involved in this controversy.

Respectfully submitted,

(Signed)

W. F. WILSON,  
JOHN F. MARTIN,  
E. C. LOVE,  
LOONEY, WATTS, FENTON AND  
EBERLE,  
*of Oklahoma City, Oklahoma;*  
T. AUSTIN GAVIN,  
*of Tulsa, Oklahoma,*  
*Attorneys for Appellants.*





## APPENDIX "A".

March 23, 1937.

Honorable A. L. Crable,  
State Superintendent of Public Instruction Building.

DEAR SIR:

The Attorney General acknowledges receipt of your letter February 15, 1937, wherein you ask:

"You will recall that Senate Bills 1 and 3, enacted by the Extraordinary Session of the Legislature in December, 1936, appropriated the total sum of \$300,000.00 for the purpose of purchasing textbooks to be given to children of certain classes as defined in said bills.

"In view of Section 5, Article II, of the Oklahoma Constitution, we shall appreciate an opinion from you as to whether or not the books provided in the two bills mentioned might legally be distributed to children attending parochial, sectarian, or other private schools, as well as to the other classes of children mentioned in the bills."

Senate Bill No. 1, *supra*, went into effect on January 4, 1937. The title of said Act is as follows:

"An Act making an appropriation of \$150,000.00 out of any moneys in the State Treasury not otherwise appropriated *to purchase text books to be furnished free by the State to children of drought-stricken farmers, laborers and other children whose parent or guardians are unable to purchase necessary school books: providing for the distribution thereof, and declare an emergency.*"

Section 1 of said bill is as follows:

"There is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars *to pay for purchasing free textbooks by the State of Oklahoma for the children of drought-stricken farmers of the State, laborers and other children who have parents or guardians unable to purchase necessary school books.*"

It will be noted that the underlined portion of section 1, *supra*, is in exact harmony with the underlined portion of the title of said act. Section 2 of said bill makes it the duty of the County Welfare Boards of Oklahoma to distribute the textbooks above mentioned. It will be noted that neither that part of the title nor body of said Senate bill which refers to the making of said appropriation and to the distribution of said textbooks, contains language limiting the application thereof to the purchase or distribution of said school books for or to the children of drought-stricken farmers, etc. who attend the *free* public schools of the state, or language prohibiting the purchase or distribution of such books to like children who attend "parochial, sectarian, or other private schools" such as are mentioned by you. It was evidently the object of said bill to aid the children of drought-stricken farmers, etc. to obtain school books to be used by them in attending school, irrespective as to whether or not said children were attending a free public school or a parochial, sectarian, or other private school. Said object is further indicated by the fact that the County Welfare Boards of this State, whose regular relief activities are exercised for the benefit of *all* the needy citizens of Oklahoma, were selected to distribute said school books.

Senate Bill No. 3, *supra*, went into effect on December 16, 1936. The material part of the title of said act is as follows:

"An Act making appropriation \* \* \* to purchase textbooks for the children of drought stricken farmers and destitute, poor and indigent school children, \* \* \* authorizing the purchase of textbooks to be distributed to the children of drought stricken farmers and destitute, poor and indigent school children: \* \* \*"

It will be noted that neither that part of said title which refers to the making of said appropriation or that part which refers to the distribution of said textbooks, are limited in their application to textbooks for the use of children of drought-stricken farmers, etc. who attend *free* public schools. Section 1 of said Senate Bill No. 3 is in part as follows:

"There is hereby appropriated out of any funds in the State Treasury not otherwise appropriated, the following sums of money for the following uses and purposes, to-wit: \* \* \* to purchase textbooks for the children of drought stricken farmers and destitute, poor and indigent school children, \* \* \* the sum of One Million, Six Hundred Fifty Thousand (\$1,650,000.00) Dollars, \* \* \*"

It will be noted that the above quoted portion of Section 1 of Senate Bill No. 3, supra, is in exact harmony with that part of the title of said bill which relates to the making of said appropriation, and that neither thereof contains language limiting said appropriation to the purchase of textbooks "for the children of drought-stricken farmers and destitute, poor and indigent school children" who attend the *free* public schools of the state, or prohibiting said appropriation from being used to purchase such books for like children who attend parochial, sectarian, or other private schools. In fact, when one considers the provisions of Section 57, Article 5, of the Constitution of Oklahoma, which provides that every act of the Legislature "shall embrace but one subject, which shall be *clearly expressed* in its title," it is doubtful if the Legislature could have provided in either of said bills that the appropriations made therein, as aforesaid, could be used only for the purpose of purchasing textbooks for said poor, indigent children etc. attending *free* public schools, to the exclusion of *like* children attending parochial, sectarian, or other private schools. Section 2 of said Senate Bill is in part as follows:

"There is hereby *allocated* out of the funds herein appropriated the sum of \$150,000.00, or so much thereof as may be necessary, for the purchase of school books, legally adopted by the Oklahoma State Text Book Commission, which adoptions shall not expire prior to June 1, 1938, *such books to be purchased for use* by children of farmers in drought stricken areas and *by poor, indigent school children in the public schools of the various counties of the state.* \* \* \*"

It will be noted that the above quoted language authorizes said \$150,000.00 to be expended for the purchase of books,

not only for the use of children of farmers in the drought stricken areas, but for the use of "poor, indigent school children in the *public schools* of the various counties of the state," which latter language is susceptible of being construed to prohibit said \$150,000.00 from being expended to purchase school books for "poor, indigent school children" who do not attend *free public schools* but who do attend parochial, sectarian, or other private schools.

It is true that the words "public schools" when used in a statute, usually refer to the free public schools of the state which are supported by taxation, but, as is shown by the case of *Oklahoma Ry. Co. v. St. Joseph's Parochial School et al.*, 33 Okla. 755, 127 Pac. 1087, the object of a statute may be such as to prevent said words from having such a restricted meaning. In said case, the Supreme Court of Oklahoma, in an opinion prepared by Mr. Justice Williams, construed the meaning of the words "public schools" as contained in an ordinance of Oklahoma City granting the Oklahoma Railway Company a franchise to operate a street railway in said city, the material part of the syllabus of said case being as follows:

"\* \* \* Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railways provides:

"*'Tickets for the use of school children shall be furnished good for one continuous passage, in quantity of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city'. Held, that 'public schools of said city' include the public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolence.'*"

In the body of the opinion of said case it is stated:

"\* \* \* The object in view was to facilitate the education of the children of the city.\* \* \* a fair interpretation of this contract leads to the conclusion that it covers



children under the age of fifteen years attending schools in Oklahoma City, *whether maintained by the public by taxation or by private agencies for the public by private benevolence.*"

As heretofore stated, the evident object of Senate Bill No. 1, *supra*—the companion bill to Senate Bill No. 3, and which was adopted *subsequent* thereto—is to aid the children of drought-stricken farmers, etc. to obtain school books to be used by them in attending school, irrespective of whether or not said children are attending a free public school or a parochial, sectarian, or other private school. The title and appropriating provisions of Senate Bill No. 3, reveal a like object, and, in consideration of the decision of our Supreme Court above referred to, the Attorney General is of the opinion that the use of the words "public schools" in Section 2 of Senate Bill No. 3, which words are not used in the parallel portion of the title thereof, should be construed to include the public schools of Oklahoma, whether maintained by the public by taxation or by "private agencies for the public by private benevolence," such as the parochial, sectarian and other private schools, mentioned by you.

In relation to that part of your letter wherein you ask if Section 5, Article 2, of the Constitution of Oklahoma, prohibits the distribution of said textbooks to children otherwise qualified, simply because said children are attending parochial, sectarian, and other private schools, you are advised that the material part of said section is as follows:

"No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any \* \* \* sectarian institution *as such.*"

By an examination of Senate Bills 1 and 3, *supra*, it will be found that the textbooks purchased and distributed under the provisions thereof are purchased and distributed *for the use of school children* and not for the use of the schools they attend, and the mere fact that certain of

said children may use said books while attending schools conducted by sectarian institutions would not cause public money or property to be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of said "sectarian institution as such." In this connection attention is called to the case of *Borden v. Louisiana State Board of Education*, 138 La. 1005, 123 So. 655, in which the Supreme Court of Louisiana held:

"In our opinion, which is the view of the majority of the court, these acts violate none of the foregoing constitutional provisions. One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. *The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made.* True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries."

The Supreme Court of New York took the opposite view in *Smith v. Donahue*, 195 N. Y. S. 715. However, the Louisiana decision was followed in *Cochran v. Louisiana State Board of Education*, 168 La. 1030, 123 So. 664, which case was affirmed by the Supreme Court of the United States in 50 S. Ct. 335, 281 U. S. 370, 74 L. ed 913, and the Attorney General believes that it should be followed in determining the question under consideration.

In view of the foregoing, it is the opinion of the Attorney General that Section 5 of Article 2, *supra*, does not prohibit the distribution of textbooks purchased with funds appropriated by Senate Bills 1 and 3, *supra*, to children attend-

ing parochial, sectarian, and other private schools; provided such textbooks have been

“legally adopted by the Oklahoma State Text Book Commission, which adoption shall not expire prior to June 1, 1938.”

Yours respectfully,

For the Attorney General,

FRED HANSEN,

*Assistant Attorney General.*

Approved in Conference 3-4-37.

### **APPENDIX “B”.**

#### **IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.**

No. 29,754.

MIKE GURNEY, et al., *Plaintiffs in Error,*

*vs.*

J. R. FERGUSON, et al., *Defendants in Error.*

#### **Syllabus.**

1. The term “sectarian institutions” as employed in section 5, article 2 of the Oklahoma Constitution includes sectarian or parochial schools.

2. A legislative act purporting to authorize or direct the payment or expenditure of public funds for transporting pupils to and from school is an enactment in the exercise of the duty and power of the state to maintain the public schools of the state under direction and authority of section 5, article 1 of the State Constitution. It authorizes and directs payment or expenditure of the public funds for school purposes and is not enacted in the exercise of the police or other power.

3. Any legislative enactment which has the effect of authorizing or requiring the use of public property or the

expenditure of public school funds in transporting pupils of a sectarian school to and from such school is violative of section 5 article 2 of the Constitution of Oklahoma. For those reasons article 11, Chapter 34 S. L. 1939, insofar as it refers to parochial schools, is unconstitutional and void.

Appeal from the District Court of Oklahoma County.  
Hon. Ben Arnold, Judge.

Mandamus action to compel transportation of pupils to parochial school by means of public school buses owned and operated at public expense. Writ denied and applicants appeal.

*Affirmed.*

W. F. Wilson; Mont F. Highly, T. K. Quillin, W. F. Wilson, Jr., Mont F. Highly, Jr., Leo Considine, J. Frank Martin and Frank C. Love, all of Oklahoma City, Oklahoma, and T. Austin Gavin, of Tulsa, Oklahoma, for Plaintiffs in Error.

Dudley, Hyde, Duvall & Dudley, and Dennis Wright, Oklahoma City, Oklahoma, for Defendants in Error.

WELCH, C. J.

The question is whether article 11, Chapter 34, S. L. 1939 is constitutional.

The same provides:

“That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this State shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board.”

It is here sought to compel the school district officials, in conformity with said act, and by use of the public school bus and at the expense of the public school funds, to transport certain pupils on their way to and from a certain ad-

mittedly parochial school for the purpose of attending such school.

We examine the law to determine whether the trial court erred in its conclusions that the legislative act is violative of section 5, article 2 of the Oklahoma Constitution.

Such constitutional provision is quoted as follows:

“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”

Plaintiffs in error base a goodly portion of their argument upon the premise that the above quoted provision of our Constitution says nothing about schools. The suggestion is made that therein lies a material distinction between such provision of our Constitution and certain constitutional provisions of other states which have there been considered in connection with similar questions. The net result of the suggestion would seem to be that the term “sectarian institution” does not include a sectarian or parochial school, leading to the ultimate result that our said constitutional provision did not inhibit the use of public funds directly for the maintenance of such a school.

We would not be inclined to accept that premise even if compelled to rely solely upon the phraseology of this particular provision. It seems to us that it would be commonly understood that the term “sectarian institution” includes a school or institution of learning which is owned and controlled by a church and which is avowedly maintained and conducted so that the children of parents of that particular faith would be taught in that school the religious tenets of the church.

When the interpretation suggested by plaintiff in error leads to the result that the framers of our Constitution did not intend to prohibit the direct expenditure of public funds in support of sectarian schools, then the complete error of that contention is demonstrated. It is provided in section 5, article 1 of the Constitution that the schools which the

state is authorized and directed to establish and maintain shall be "free from sectarian control." We feel there is no doubt that section 5, article 2 supra, prohibits the use of public money or property for sectarian or parochial schools.

It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school "as such;" that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be "utterly without substance" in *Judd v. Board of Education* 278 N. Y. 200, 15 N. E. (2d) 576. It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.

The expenditure of the public funds for the purpose here shown is confined to children attending school. Thus refuting any argument that such transportation is for the

benefit of children generally and not for schools or that such transportation is furnished in regulating traffic within the police power, or primarily in promoting the health and safety of the children of the state. In *Consolidated School Dist. v. Wright*, 128 Okla. 193, 261 Pac. 953, it was held that transportation of pupils is an act done in carrying into effect the educational program contemplated by the Constitution and statutes.

The appropriation and directed use of public funds in transportation of public school children is openly in direct aid to public schools "as such." When such aid is purported to be extended to a sectarian school there is in our judgment a clear violation of the above quoted provisions of our Constitution. It is our duty only to read the applicable provisions of the Constitution and analyze them and apply to the question here the intent and purpose disclosed by the expressions in the Constitution. That document embraces the fundamental and basic law of the state, and courts and judges, like everybody else, are bound to follow it. "It is not the province of the Courts to circumvent it because of private notions of justice or because of personal inclination" as was said in the *Judd* case, *supra*.

The case of *Oklahoma Railway Company v. St. Joseph's Parochial School et al.*, 33 Okla. 755, 127 Pac. 1087, did not involve the expenditure of public funds and is merely an example of the exercise of the state's function of regulating transportation companies and the case was one of construction of certain provisions of the railway company's contract and franchise. We do not believe that case is authority for the assertion that a private or parochial school is a part of the state's public school system or equivalent thereto, so as to authorize the maintenance thereof from public funds.

Our conclusion here is fully supported by the reasoning and conclusion in *Judd et al. v. Board of Education et al. supra*. Therein that court had before it a case involving the same essential facts and questions, and considered constitutional provisions of no material difference from our own in the instant respect. That court very ably collected and discussed most of the present available

authorities on the several questions presented here and in our view is acceptable as precedent herein.

Other authorities which support our present opinion and which are likewise relied upon in the Judd case, *supra*, are *State ex rel. Traub v. Frank*, (Sup. Ct. Delaware) 172 Atl. 835; *Synod of Dakota v. State*, 50 N. W. 632; *State ex rel. Van Straten v. Milquet, School Treas.* (Wis.) 192 N. W. 392; *Williams et al. v. Board of Trustees, Stanton Common School Dist.* (Ct. App. Ky.) 191 S. W. 507.

The brief for plaintiff in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and all their institutions to function and operate under church control exclusively. We agree. In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution.

The judgment is affirmed.

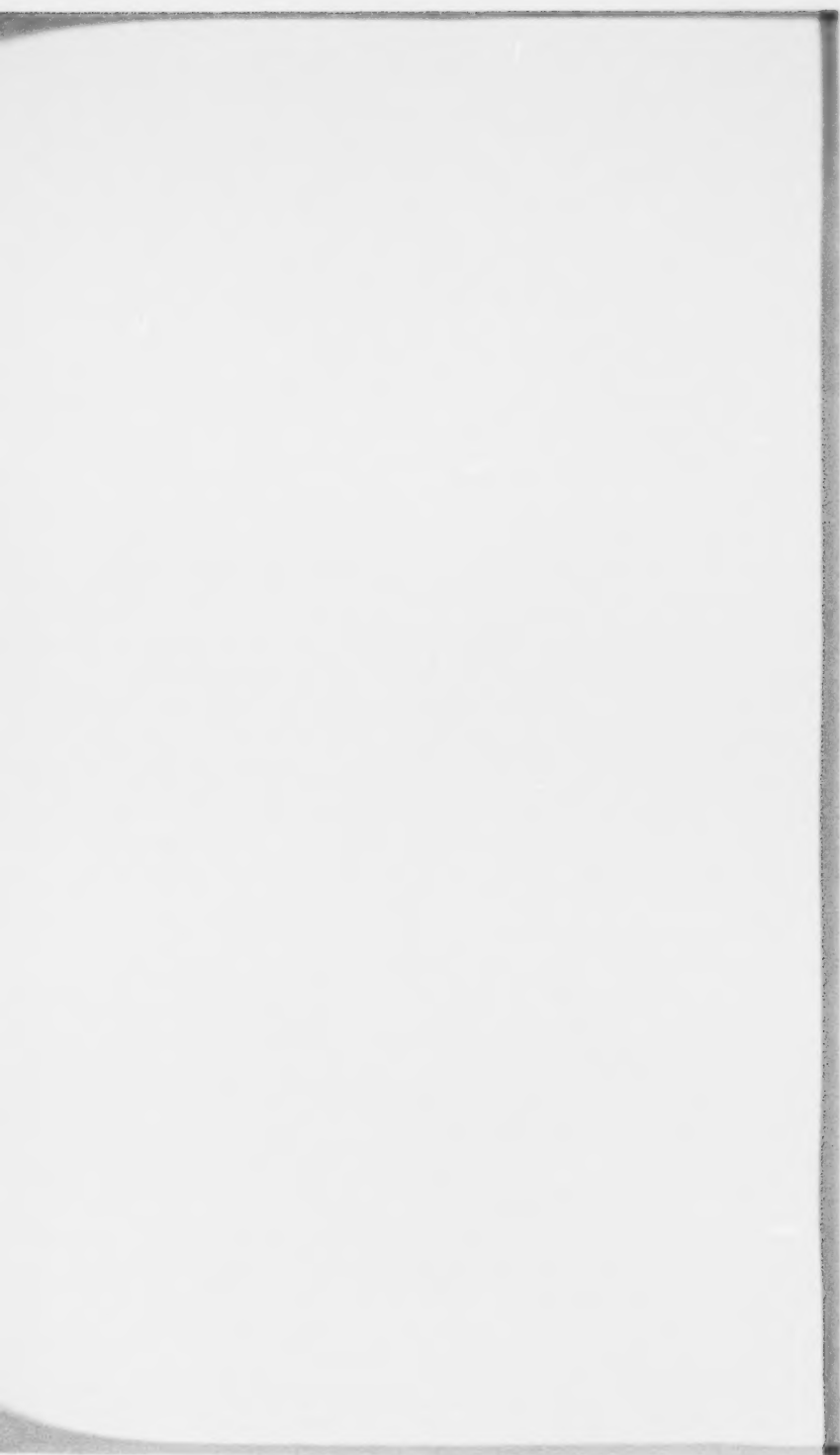
Corn, V. C. J., Riley, Osborn, Bayless, Hurst, and Davidson, JJ. concur.

Gibson, J. dissents.

Arnold, J. not participating.

Filed in Supreme Court of Oklahoma, Dec. 2, 1941.  
Andy Payne, Clerk.







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CLERK

NO. 128

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**In the Supreme Court of  
the United States**

OCTOBER TERM, 1942

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MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,  
*Appellants,*

VERSUS

J. R. FERGUSON, H. L. CONLEY, GEORGE BRADLEY, ETC., ET AL.,  
*Appellees.*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

---

**PETITION FOR REHEARING OF STATEMENT AS TO  
JURISDICTION FOR WRIT OF APPEAL TO THE  
SUPREME COURT OF THE STATE  
OF OKLAHOMA**

---

W. F. WILSON,  
JOHN F. MARTIN,  
E. C. LOVE,  
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*Counsel for Appellants.*

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*Of Counsel.*

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UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.



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**NO. 128**

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**In the Supreme Court of the United States**

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**MIKE GURNEY, STEVE RUDEK AND JOHN M. DREW,**  
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**VERSUS**

**J. R. FERGUSON, H. L. CONLEY, GEORGE BRADLEY, ETC., ET AL.,**  
*Appellees.*

---

**APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA**

---

**APPELLANTS', PLAINTIFFS IN ERROR,  
PETITION FOR REHEARING**

---

Come now Mike Gurney, Steve Rudek and John M. Drew, the above appellants, and petition this Honorable Court to set aside the order heretofore made and entered by it on the 12th day of September, 1942, dismissing the appeal heretofore sued out from the final order and decision of the Supreme Court of the State of Oklahoma against them and denying petition for writ of appeal and certiorari, and for cause thereof show:

That this action is one arising under Article 4 of the Constitution of the United States, which reads as follows:

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several States," and under Article 6 of the Constitution of the

United States, that portion of the same reading as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The Legislative assembly of the State of Oklahoma, in the year 1939, passed the following Act, known now as Title 70, Section 1198 of the Oklahoma Statutes, 1941:

"That whenever any school board shall, pursuant to this section or to any law of the State of Oklahoma, provide for transportation for pupils attending public schools, all children attending any private or parochial school under the compulsory school attendance laws of this state shall, where said private or parochial school is along or near the route designated by said board, be entitled equally to the same rights, benefits and privileges as to transportation that are so provided for by such district school board."

Previously, the Legislature had provided by proper and appropriate acts authority for all school districts in the state to contract for and operate free school buses for children attending school who were of compulsory school age under the laws of the State of Oklahoma. This Act included all white children and all colored children. The expense thereof was to be raised by taxation within the school district thus served which amount of taxes to be raised was to be based upon an actual school census of all children, within such school district, both white and colored, of compulsory school age.



Of course, this Act was made and entered by the Legislative Assembly pursuant to the police power of the State of Oklahoma, in order to protect school children in the country districts going to and from school, from weather conditions and all the hazards attendant upon their traveling along the public highways to and from school. The census of the school children within each particular district included all children of compulsory age, including those in attendance at public, private and parochial schools, the Legislature, in its benign care, pursuant to the exercise of its police power, having in mind the children attending private and parochial schools in addition to those attending the public or common schools, considering, doubtless, their lives and limbs and exposure to the inclemency of weather conditions, since they are all regarded as children of the state and would be entitled to equal protection along with all other school children included in the census or enumeration for which a tax levy was made to pay for the transportation of such children in school buses.

Pursuant thereto, the Appellee School District did cause a census to be taken within said school district, which included all the children attending the parochial school conducted by the Carmelite Sisters at Harrah, Oklahoma, located in the same town and near proximity to the common or public schools and contracted for this service with responsible carriers at the sum and price of \$8400.00 for the scholastic year 1939 and 1940, and levied a tax upon all the taxable property within said school district, both that owned by children whose parents were sending them to parochial or private schools, and at least, theoretically, a

bus seat reservation, since they were included in the school census, was reserved for their accommodation in such school buses, for which the taxpayers paid.

This controversy arose when the three appellants, who are United States citizens, country farmers within the appellee school district, tendered their ten children to the drivers of the school buses on the day of the opening of the public schools, along convenient places on the highway where children attending the public or common schools were and had been under the theretofore existing Act, received for such transportation. The appellee school district, and its bus drivers apparently acting under directions of the school authorities, refused to receive, accept and transport the ten children of these appellants so tendered for transportation, and mandamus action was brought to compel their reception and transportation in free school buses, along with other children of compulsory school age attending the common or public school. This appeal, and the jurisdiction of this Court to entertain the same, is now invoked on this application for rehearing, grounded upon their rights under the constitution and laws of the United States of America to have equal protection along with all other children of compulsory school age of other parents attending the common or public schools, in accordance with the Legislative enactment made by the General Assembly in 1939.

Nothing is asked in this action, and particularly in this petition for rehearing, except the service to which these children attending a parochial school should have in common with all children attending the public schools.

So said the wise Legislature of the State of Oklahoma, and the Act is in all respects a proper exercise of the police power of the state, exercised through the legislative assembly and a service for which taxpayers of the appellee school district have been assessed and paid taxes on all property taxable under the laws of Oklahoma located within the territorial district comprising said appellee school district.

The denial of this right that these children own and possess and their parents for them, at their election to send their children to a parochial school, abridges and circumvents their constitutional rights secured to them as citizens of this Democracy and expressly provided for by the constitutional enactments of the United States, as aforesaid.

While this action is pitched upon the right of these appellants as citizens of this nation, particularly upon Articles 4 and 6 of the Constitution of the United States, other sections of the Constitution, to-wit, Amendment I of the Constitution of the United States, being the religious liberty section sometimes known as the Thomas Jefferson Amendment, and Amendments 5 and 14, are matters for serious consideration in connection with the rights of the appellants herein contended.

Litigation has spread throughout the nation in the courts of the various states arising under the various provisions of the Constitution of the United States, treaties made pursuant thereto involving the personal liberty of citizens of the different states, secured to them under these various national constitutional provisions and amendments.

This litigation has taken the form, for the most part, in the so-called free text book cases and latterly the free school bus cases. Prior to the arising of this character of litigation, an action was brought in the courts of Oklahoma to compel, through a mandamus proceeding, inter and intrastate commerce of wine used for sacrifice of the Holy Mass by the priesthood of the Catholic Church and other religious bodies, notwithstanding the Bone Dry law of the State of Oklahoma. A case decided by our own Oklahoma Supreme Court is that of *DeHasque v. Atchison, Topeka and Santa Fe*, 68 Okla. 183, 173 Pac. 73. The lower court in that case had held against the church in the mandamus proceeding. The decision of the lower court was reversed and the Supreme Court of Oklahoma decided that the use of wine which was intoxicating in no manner was in violation of the Bone Dry law of the State of Oklahoma, and read into the Bone Dry statute the exception, thereby permitting the transportation of wine for sacramental purposes, stating in the review by the Court that the practice of sacrifice of the Holy Mass had been indulged in within the territorial confines of the State of Oklahoma since the Sixteenth century. Since that decision, Catholics and all other religious bodies requiring wine have freely had access to the same through both interstate and intrastate transportation.

Still another case by the Supreme Court of Oklahoma, that of *Oklahoma Railway Co. v. St. Josephs Parochial School*, 33 Okla. 755, 127 Pac. 1087, it is held that street car tickets required by the transportation company to be furnished to children attending public schools of

the city at reduced fares required such transportation company to receive and accept like fares from school children attending St. Josephs Parochial School, and that the term "public schools of said city" included all public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolences.

There has been, therefore, an apparent effort on the part of our courts to deal with religious rights with liberality. In keeping with these two cases, it was confidently expected that our courts would continue to adhere to such a liberal doctrine of construction. Therefore, the decision of the Oklahoma Supreme Court in the instant case, which is quoted in full in Appendix B in the present contest, constitutes, to some extent, a departure from this previous principle or doctrine by our courts. It is based solely upon the constitutional provision obtaining in Oklahoma, being Section 5 of Article 2, and Section 5 of Article 11, quoted in full at page 7 of the appellants' brief supporting its statement as to jurisdiction.

The appellants find no fault with these provisions of our state constitution. They are regulatory of the purposes for which school funds may be adopted and used. These funds arise from the proceeds of sale and disposition of Sections 16 and 32 administered by the School Land Department of the State of Oklahoma, in every township in the old Oklahoma Territory, now being administered along with five million dollars appropriated by the National Congress for the use and benefit of the schools of the state to equalize the funds raised from the

sale and disposition of these school lands in old Oklahoma Territory when joint statehood was declared for the two territories, to-wit, Oklahoma and Indian Territories. It is appellants' theory that these two constitutional provisions can remain intact and that they contain no inhibition against the enactment of the 1939 Legislative Assembly providing for the transportation in free buses of school children attending private and parochial schools. Appellants' position in this respect is well illustrated and defined by the decision of the Supreme Court of the United States in *Cochran v. Louisiana State Board of Education*, 281 U. S. 379. In that case former Chief Justice Hughes wrote the opinion, quoting from the Supreme Court of the State of Louisiana, and adopting the philosophy of said decision as the final decision of the Supreme Court of the United States, and said as follows; paraphrasing the language used by the Louisiana Court with the following preliminary observation:

"The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the supreme court of state as follows (168 La., p. 1020, 67 A. L. R. 1183, 123 So. 655):

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free

of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries \* \* \*."

Contrast this theory with the decision rendered by Chief Justice Welch in the Supreme Court of Oklahoma in the instant case, wherein it is stated:

"It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be 'utterly without substance' in *Judd v. Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576."

The previous statement of Justice Welch, that the argument advanced by appellants was not impressive, was made by him with full knowledge of the decision of Chief Justice Hughes, foregoing, and with full knowledge that free textbooks were being furnished to children attending parochial and private schools, which textbooks were purchased by the State of Oklahoma from public funds appropriated by the legislature for that purpose, and this pursuant to no legislative enactment, but because of the

opinion of the Attorney General of the State of Oklahoma after the rendition of the opinion by the Supreme Court of the United States in the Louisiana textbook case, which opinion forms Appendix A to the appellants' original statement to this Honorable Court seeking to have this Court take jurisdiction of the controversy.

This Honorable Court took jurisdiction, and granted the writ, in the Cochran case. The application therefor was made by the taxpayers of the State of Louisiana, who sued out the writ of appeal in that case.

Here, the appellants invoke the jurisdiction of this, the highest court in our land, to protect their humble constitutional rights as citizens of this nation. If this Honorable Court took jurisdiction in the Cochran case it should now take jurisdiction in this case.

Chief Justice Welch referred to the Judd case in New York, which was a bus transportation case, wherein transportation of parochial and private school children was refused and the action in so doing was upheld by the Court of Appeals of the State of New York. In that state the patrons of private and parochial schools, as a matter of history, have been strong enough to vote a constitutional amendment at the polls of that state, and New York children attending private and parochial schools are now riding the free buses.

In the construction placed on the free textbook case by the State Supreme Court of Louisiana, and adopted by the Supreme Court of the United States in the Cochran case, it is specifically held that no church or sectarian



institution received any benefit by reason of furnishing the children attending such schools free textbooks. Here, the Supreme Court of Oklahoma rejects this reasoning, with the statement, "That argument is not impressive."

While there are other patrons, consisting of various religious denominations and parents of children preferring private and parochial schools to public schools, nevertheless, the vast majority of parents preferring such character of schools are members of the Catholic faith. The right of a Catholic parent to send his children to a school conducted by the members of his faith and for their use and benefit and for religious purposes has been sustained by the Supreme Court of the United States in *Pierce v. Society of Sisters of Holy Name*, 268 U. S. 510, in an opinion by former Justice McReynolds. This is commonly known as the Oregon School Case, wherein it was sought by legislative enactment of the State of Oregon to compel all children of compulsory school age to attend a public school. This principle of law as to the transcendent right of a parent to direct his children of compulsory school age to attend a Catholic or parochial school subordinates the right of the state under the doctrine of *parens patriae*, and this transcendent right of a parent permeates the legal lore of the nation and has been universally sustained by the courts since the decision of Mr. Justice McReynolds in the Oregon School Cases.

While we do not in this application and petition desire to raise any issue of prejudice against Catholicism, nevertheless, an inquiry into physical conditions may reflect some reason for our Supreme Court, that of Okla-

homa, to make the observation made by its Chief Justice in the opinion in the instant case, "That argument is not impressive". According to the 1940 census of the United States, the Catholic population of the State of Oklahoma is given at page 857 of the World Almanac for the year 1941, as 64,700; compared with the total population of the State of Oklahoma, shown at page 503, same authority, as 2,334,237, this is an approximate Catholic population of  $2\frac{1}{2}$  per cent of the total population of the state.

While there are other religious bodies and patrons of both religious and private schools than Catholics in the State of Oklahoma, such as Seven Day Adventists, Lutherans, Episcopalians and persons of Jewish faith, maintaining and patronizing religious and private schools, their numerical strength is not available, but is bound to be much smaller than even the Catholic population of the state.

Now, in the State of New York, where the Judd case was decided, and a constitutional amendment was enacted by popular vote, the same authority, to-wit, World Almanac 1941, gives the total Catholic population of the dioceses of New York City, Brooklyn, Albany, Buffalo, Ogdensburg, Rochester and Syracuse, as a total of 3,111,763, while the state's total population is given as 13,379,622, the Catholic population being approximately 24 per cent of the total population of the state. Other believers in and patrons of private and religious schools, than Catholics, are likewise doubtless more numerically and in ratio than in Oklahoma, but the figures are not available. This is the state that voted the constitutional amendment,

notwithstanding the appellate court's decision, providing for the transportation of parochial and private school children on free school buses.

Now, the State of Louisiana, wherein the Cochran case was decided by the Supreme Court of that state, has in its three dioceses, to-wit, New Orleans, Alexandria and LaFayette, a Catholic population of 811,287, while the State of Louisiana's total population is 2,360,661. The Catholic population of the State of Louisiana is, therefore, approximately 34 per cent.

Human nature is human nature. Men, even jurists, cannot help being influenced by their environment and daily communion with their fellow men. Doubtless, the population of Catholic faith have inspired the judicial minds of the State of Louisiana, and the Catholic vote has influenced the political situation in the State of New York, just the same as the Protestant inclination has manifestly and unwittingly had its influence in the decision of our Supreme Court in the instant case, for all the judges concurred, except Justice Gibson, in the determination that this legislative enactment of the year 1939 was unconstitutional under the flimsy pretext, as expressed by Chief Justice Welch that "That argument is not impressive," referring to the use of public funds being for the benefit of the child and not for the benefit of the sectarian institution conducting the school.

In the foregoing comparison, based on actual population figures, we referred to the Protestant influence as dominant in Oklahoma. That may be more or less of an

erroneous statement. We mean to say that the influence, instead of being Protestant, which has opposed the petitioners in this litigation, arises out of distinctly anti-Catholic sentiment, of which the Ku Klux Klan are the chief exponents. In all candor, these appellants now beseech this Honorable Court to take jurisdiction of this case.

The principle here involved is fundamental, that is, their rights as citizens of this great Democracy. The original demonstration of the limits to which an independent American citizen will go to protect his rights has been lastingly illustrated before this nation was born and conceived, as evidenced by the Boston Tea Party, taking place in the Harbor of Boston, Massachusetts, wherein the principle of taxation without representation has been vividly exemplified. Citizens of this Democracy will have their constitutional rights, and with all due respect to this Honorable Court in its previous decision rejecting the case for want of jurisdiction, we now make this renewed appeal to the Court for the relief to which we sincerely believe we are entitled. Sooner or later, this Court will doubtless have further applications made to it for relief of citizens of the nation and the protection of their fundamental right to exercise their power of selection in this question of schools.

The State of Wisconsin, in the case of *Van Stratton v. Milquet School Treasurer*, 180 Wis. 109, 192 N. W. 392, has held that free school buses were not available to children attending private and parochial schools. It is reported in the Public Press that the Superior Court of Thurston County, State of Washington, has adhered to the

same ruling. In the State of Washington case the Attorney General had rendered an opinion that parochial and private school children were entitled to bus privileges independent of any legislative enactment by that state. In Wisconsin we are not aware of the condition of the legislative enactment, if any.

The Attorney General of Oklahoma, had he followed his opinion following the decision of the Supreme Court of the United States in the Cochran case that had to do, of course, with free textbooks, would have, doubtless, as a matter of construction, held that bus privileges were available to children attending private and parochial schools, and, had he been consistent, would have undoubtedly, after the legislative enactment in question of the 1939 Assembly so held.

The State of Mississippi, in a very recent decision, that of *Chance v. Mississippi State Book R. & P. Board*, 200 So. 706 (State Reporter not yet available), followed Chief Justice Hughes' opinion, in direct conflict with the Oklahoma decision in the instant case.

The Constitution of the State of Mississippi, 1890, Section 208, provides as follows:

"Section 208—It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement by establishing a uniform system of free public schools by taxation or otherwise for all children between the ages of five and twenty-one years, and as soon as practicable to establish schools of higher grade. No religious or other sect or sects shall control any part of the school or other educa-

tional funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

Chapter 202—Laws of 1940—is an act to establish a State Textbook Rating and Purchasing Board, with the power to select, purchase and distribute free textbooks by loaning same to pupils through the first eight grades in all qualified Elementary Schools of the State.

Section 23 of Chapter 207 provides, "This act is intended to furnish a plan for re-adoption, purchase and distribution, care and use, of free textbooks to be loaned to the pupils in the elementary schools of Mississippi."

The court states:

"The privilege of requisition by qualified private and sectarian schools for the loan of books to its pupils does not place in such schools the 'control' (of) any part of the school or other educational funds of the state. The mere availing of benefit of an appropriation carefully made does not result in a 'control' of such funds \* \* \*. Nor is the loaning of such books under the circumstances to the individual pupils a direct or indirect aid to the respective schools which they attend, although school attendance is compulsory. Such pupil is free to attend a proper public, or private school, sectarian or otherwise \* \* \*. This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that religious institution is aided."

There will be found among the citizenry of the nation

no stauncher supporters than members of the Catholic faith, of the theory of American freedom, religious liberty and the sacredness of American institutions. Catholics, in their full quota, and doubtless far in excess of their full quota, have furnished the armed forces of the United States with their full complement of membership. Their belief, religiously inspired, is that of absolute separation of church and state in the American Republic, each co-equal in their own spheres, the church in ecclesiastical matters, the nation in governmental matters, ever willing to fight, and die, if necessary, for the preservation of the nation in all its glory and liberties.

We respectfully submit that inasmuch as this Honorable Court can now see from the facts herein stated that sooner or later this Court is bound to exercise its jurisdiction in the permanent settlement of this litigious question as to the rights of the citizens of the nation in their own sphere and beliefs as to schools their children of compulsory school age shall attend, where they shall be educated and how educated.

We respectfully petition this Honorable Court to now take jurisdiction of this cause and determine a controversy in its early stages before further developments occur, and not leave the serious question of this fundamental right to the tender mercies of the different states, and that, following the existing rule as evidenced by the Cochran Louisiana Textbook Case, on final consideration by this Honorable Court of said cause, the question be resolved in favor of these appellants, in full vindication of their rights, and the reversal of the decision of the Supreme Court of

Oklahoma in the instant case. Such prompt action will prevent a multiplicity of suits and unify and make one the inherent and inalienable right of every citizen of this Republic in the exercise of his option, which he now knows he has, but which lacks the safeguard of a court of final jurisdiction by reason of its decision fully vindicating such right to choose, as our Honorable Supreme Court of this nation has said, the school or influence in which his children of compulsory school age may be educated, they to be afforded all the rights of other children, all being children of the state, and that they be held to be entitled to the privileges of school bus accommodations, pursuant to the legislative enactment of Oklahoma, paid for by their parents through taxation, and the vacant seats in such school buses provided for them by reason of the census taken of the school population of said rural school district, be filled with their presence and they be thereby protected from the hazards of the highway in common with all other children of the state.

Respectfully submitted,

W. F. WILSON,

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E. C. LOVE,

T. AUSTIN GAVIN,

*Counsel for Appellants.*

LOONEY, WATTS, FENTON & EBERLE,  
*Of Counsel.*



CERTIFICATE OF COUNSEL

State of Oklahoma,

SS:

Oklahoma County,

I, W. F. Wilson, of counsel for the appellants in the above entitled cause, do hereby certify that the within and foregoing Petition for Re-Hearing of the appellants for Writ of Appeal to the Supreme Court of the State of Oklahoma is not presented for delay, but in good faith for the purpose of presenting legal questions to the Court and alleged errors and misunderstandings, and for the further purpose of calling to the attention of this Court the fundamental legal question herein involved, that of taxation of property owners upon their property without, according to such taxpayers, the enjoyment of the benefits derived through the means of such taxation.

Dated at Oklahoma City, Oklahoma, this.....day of October, 1942.

.....  
W. F. WILSON,

*Counsel for Appellants.*